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SUPREME COURT, U.S.

No. 98-544

IN THE

Supreme Court of the United States

October Term, 1998

CHARLES MERINO,

Petitioner,

v.

SAN DIEGO COUNTY COUNCIL OF THE BOY SCOUTS OF AMERICA AND RONALD BRUNDAGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000
Attorneys for Respondents

Of Counsel
MICHAEL M. EDWARDS
EDWARDS, SOOY & BYRON
101 West Broadway
San Diego, California 92101
(619) 231-1500

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QUESTION PRESENTED

Whether a petitioner for a writ of certiorari may present a claim under federal law that was not raised below, petitioner having based all his claims below on state law.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents San Diego County Council of the Boy Scouts of America and Ronald Brundage (together "Boy Scouts") respectfully request that this Court deny the petition for a writ of certiorari seeking review of a judgment of the Court of Appeal of the State of California. The opinion of the California Court of Appeal (App. 1) is not published in official reports, and the dismissal of the appeal to the California Supreme Court (App. 89) is reported at 1998 Cal. LEXIS 4329 (Cal. July 8, 1998).

STATEMENT OF THE CASE

The petition is frivolous. Petitioner, a police officer in El Cajon, California brought suit against San Diego County Council of the Boy Scouts of America and its former Scout Executive alleging that the suspension of petitioner's membership as an adult volunteer leader in Boy Scouts of America constituted discrimination by a "business establishment" in violation of California's public accommodations law and a local San Diego ordinance. The California courts ruled against petitioner on all of his claims, all of which were based exclusively on state or municipal law.

The sole question presented by Merino's petition is "[w]hether the Equal Protection clause of the Fourteenth Amendment to the United States Constitution is violated when a public employee is removed from his position based solely on sexual orientation," (Pet. i), a question never presented below.

The Boy Scouts' Explorer Post with which petitioner was affiliated had been sponsored by the El Cajon Police

Department. Petitioner argued below that this sponsorship was a factor which should cause Boy Scouts to be characterized as a "business establishment" under state law (the Unruh Act) and the San Diego Human Dignity Ordinance. This argument was rejected by the state appellate court. No equal protection claim or other constitutional claim of any kind was raised by petitioner.

In any event, it is undisputed that petitioner remained a police officer in El Cajon and that following Boy Scouts' suspension of petitioner as a volunteer leader, the El Cajon Police Department voluntarily ceased to sponsor the Explorer Post. Thus, as a matter of fact, petitioner retained his position as a public employee, having lost only his role as a volunteer leader in a private organization.

REASONS FOR DENYING THE WRIT

The petition should be denied because petitioner never presented a federal claim to the courts below. As this Court noted in *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969), "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *See Webb v. Webb*, 451 U.S. 493 (1981); *Tacon v. Arizona*, 410 U.S. 351 (1973). *See also* 28 U.S.C. § 1257(a); Rules 10 and 14 of the Rules of the Supreme Court of the United States.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

George A. Davidson
Counsel of Record
Carla A. Kerr
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004-1482
(212) 837-6000
Attorneys for Respondents

Of Counsel
Michael M. Edwards
EDWARDS, SOOY & BYRON
101 West Broadway
San Diego, California 92101
(619) 231-1500